IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA.

RSA. NO. 265 OF 1995.

Judgment Reserved on: **16.4.2007**

Date of Decision: 25.4.2007

Khumbia & Ors **…….Appellant**

Versus

Ramia. **…… Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh,Judge

Whether approved for reporting?

For the Petitioners: Ms. Devyani Sharma, Advocate.

For the respondents; Mr. C.B. Singh, Advocate.

Kuldip Singh, J

This appeal has been filed against judgment and decree dated 2.5.1995 passed by learned District Judge, Sirmaur in Civil Appeal No.126-N/13 of 1994-1991. The appellants were the plaintiffs and the parties in this judgment are referred in the same manner as in the trial Court.

The brief facts of the case as pleaded by the plaintiffs are that Arshu was their common ancestors and out of many sons his one son was Chandnu who had married Smt. Minno. Both of them are dead now. The plaintiffs along with defendant are also the sons and daughter of Chandnu. The defendant is the eldest amongst them and Chandnu had died 10 years prior to the institution of the suit. Mutation No.758 was attested showing the parties as successors of Chandnu but later on another Mutation No.828 was attested whereby the suit land has been shown to have been devolved wholly upon defendant by way of inheritance of Chandnu. The plaintiffs were

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W*hether reporters of Local Papers may be allowed to see the Judgment?*

excluded there from on the ground that they were recorded as sons of one Panna and not of Chandanu. This happened during the bifurcation of Gram Panchayat Sangana from which another Gram Panchayat Halahag was carved out as a separate Panchayat. It is the case of the plaintiffs is that during the separation of the two Panchayats, the defendant connived with the officials and got fictitious record prepared in his favour whereby he was shown exclusive surviving heir of Chandnu. The plaintiffs were shown to be the sons and daughter of Panna Ram. In this way Mutation No.828 dated 25.11.1983 was assailed to be illegal, inoperative, uncalled for and contrary to the factual position. The plaintiffs therefore, filed a suit for declaration that both the parties are sons and daughter of Chandnu and all of them are entitled to inherit his property in equal shares.

The defendant contested the claim of the plaintiffs. The case set up by the defendant is that he was born from the wed- lock of Chandnu and Smt. Minno, After the birth of defendant Smt. Minno deserted Chandnu and had broken conjugal relations with him. She established her conjugal relationship with Panna Ram, started living with him as his wife and gave birth to plaintiffs. Smt. Minno deserted Chandnu because he developed some disease and became incapacitated to consumate marital life with Smt. Minno, his wife. The plaintiffs were born from the Loins of Panna Ram who brought them up , looked after and cared about them later in life. The plaintiffs were educated by Panna Ram as their father. They were got admitted by him in the school and bore all the expenses of their education and day to day subsistence.

The learned trial Court on 26.2.1991 dismissed the suit and the dismissal of the suit has been affirmed by learned District Judge by way of impugned judgment and decree. In this way, the plaintiffs have come in second appeal which has been admitted for hearing on 11.8.1995, on the following substantial questions.:-

1. *Whether the impugned judgment and decree is the result of misreading and mis-appreciation of evidence adduced by the parties particularly AW1 and Ex.AW-1/A as well as Ex.PA/1?*
2. *Whether the evidence which was produced by the defendant in support of his case which was prima facie fabricated and manipulated and showed over writing could be relied upon by the courts below?*
3. *Whether the children born out of the legal and subsisting marriage between the parties i.e. Chandanu and Smt. Minno would be considered the legitimate children of Chandanu by attracting statutory presumption under Section 112 of the Evidence Act?*
4. *Whether the presumption of legitimacy of children born out of legal and subsisting marriage between the parties is rebutted even in the absence of any evidence regarding the non access between the parties at the relevant time when the children were begotten and/or proof of incapacitation of husband to have sexual relationship?*
5. *Whether the record of Panchayat which was in existence since the time when there was no dispute between the parties should be given credence as compared to the record which came into existence later on in time after the bifurcation of Panchayat and was prima facie manipulated as was reflected by over writings?*

I have heard the learned counsel for the parties and have also gone through the record.

The learned counsel for the plaintiffs has submitted that in the earlier record, plaintiffs have been shown sons and daughter of Chandnu but later on they have been shown children of Panna and this change is without foundation and new record can not be relied. In fact new record has been prepared at the time of bifurcation of the Sangana Panchayat. The new record is unexplained and without any basis. She has relied Section 112 of the Evidence Act for the proposition that marriage of Chandnu and Smt.

Minno has been admitted even by the defendant, such marriage was not proved dissolved and therefore, it can not be said that Smt. Minno without dissolving the marriage with Chandnu has given birth to plaintiffs from Panna. Smt. Minno admittedly was the mother of plaintiffs, therefore, plaintiffs in law will be presumed to be the children from the marriage of Chandnu and Smt. Minno. On the contrary learned counsel for the defendant has adopted the reasoning as given by the courts below in dismissing the claim of the plaintiffs. He has also submitted that no substantial question of law arises for determination in the present appeal. The two Courts below after appreciation of the evidence in right perspective has dismissed the suit of the plaintiffs.

QUESTION No.1:-

The learned counsel for the plaintiffs has submitted that Ex.PA is the copy of family register Gram Panchayat Sangana dated 4.10.1959. In this document, plaintiffs have been shown sons and daughter of Chandnu. PW-1 Ajit Singh has proved this document. In cross-examination of PW-1 some discrepancies were found and therefore, he was directed by the Court to file true copy of the Parivar Register, accordingly he filed another copy Ex.PA/1 of the Parivar Register. In Ex.PA and Ex.PA/1 plaintiffs are shown sons and daughter of Chandnu. The learned counsel for the plaintiffs has relied these documents and submitted that in the record prepared after the bifurcation of the Gram Panchayat, the plaintiffs have been wrongly shown as sons and daughter of Panna Ram . The learned District Judge permitted additional evidence in first appeal and AW, Nain Singh proved Family Register, a copy of which was placed on record as Ex.AW-1/A. In this family register plaintiffs have been shown as sons and daughter of Panna Ram.

The learned counsel for the defendant has submitted that Ex.PA and Ex.PA/1 is the copy of same document, There is no corroborative evidence in support of the entries showing plaintiffs as sons and daughter of Chandnu in Ex.PA and Ex.PA/1. These entries of plaintiffs have been proved to be

wrong, false in view of plethora of documentary evidence showing plaintiffs as sons and daughter of Panna and not of Chandnu. He has submitted that Men may lie but not the documents which were prepared when there was no dispute about the paternity of plaintiffs. Panna has been shown father of the plaintiffs in series of documents which have been placed on record and are Ex.DA, Ex.DB, Ex.D6/C, Ex.D6/D,Ex. D4/A and Ex. D4/B. Two Courts below have rightly appreciated the evidence on record. The learned counsel for the appellants has failed to point out misreading and mis-appreciation of evidence. Simply because Courts below have not believed Ex.PA, PA/1 in view of other weighty evidence that does no mean that there is misreading and mis-appreciation of evidence. Moreover, appreciation of evidence is not a substantial question of law. The Courts below have drawn correct inference from the evidence on record. Hence, question No.1 is decided accordingly by holding that there is no misreading and mis-appreciation of evidence by the Courts below.

QUESTIONS NO.2 AND 5

The learned counsel for the plaintiffs has failed to make out any case that the evidence led by the defendant is fabricated and manipulated. It has not been pointed out that which document has been fabricated and manipulated. Simply because there is some cutting or overwriting that does not mean that the document has been fabricated and manipulated. It is well known that some time cutting and overwriting take place while preparing a document by hand. The documents Ex.PA, ExPA/1, have been relied by plaintiffs to show their paternity but these documents have been proved to be without foundation. These documents cannot be given preference over series of documents mentioned above while considering Question No.1 where in plaintiffs are shown sons and daughter of Panna. It has not been explained why Panna himself has shown to be the father of plaintiffs No.1,2 in School

record referred above. The questions No.2& 5 are thus answered in negative.

QUESTIONS NO.3 AND 4

The learned counsel for the plaintiffs has heavily relied on Section 112 of the Evidence Act in order to show that plaintiffs are the children of Chandnu . The Presumption of legitimacy of a child under Section 112 of the Evidence Act is available during the continuance of a valid marriage of his parents but it is rebuttable, if non access is proved . The two Courts below on the basis of material on records have come to the conclusion that Smt. Minno was married to Chandnu and from his loins the defendant was born. Thereafter Smt. Minno left Chandnu on account of his impotency and settled with Panna from whom she gave birth to the plaintiffs. The non access of Chandnu and Smt. Minno after the birth of defendant has been proved. Panna Ram got admitted plaintiffs No.1 and 2 in the School by submitting applications Ex.DW6/A ad Ex.DW6/B wherein he has shown plaintiffs No.1 & 2 as his sons. In addition to this there is School Leaving Certificate Ex.DA of Lal Singh, Ex.DC Family Register part-1 wherein plaintiffs No.1 & 2 have been shown sons of Panna Ram. In Ex.DW6/C plaintiff No.1 has been shown son of Panna Ram. In Ex.DW6/D plaintiff No.2 has been shown son of Panna Ram and in Voter list Ex.DW4/A, plaintiffs No.1 & 2 are shown sons of Panna Ram. Ex.DB has been issued on 22.3.1969. It is thus clear that there is overwhelming documentary evidence on record to show that the plaintiffs are the children of Panna Ram. The plaintiffs can not take benefit of Section 112 of the Evidence Act in order to show that they are the children of Chandnu from Smt. Minno. Moreover, from evidence which has been discussed above, it has been otherwise established that Smt. Minno left Chandnu after the birth of defendant and started living with Panna and from the loins of Panna she gave birth to plaintiffs. The two Courts below have

rightly held that plaintiffs are children of Smt. Minno from Panna and not from Chandnu. The questions No.3 and 4 are thus decided against the plaintiffs.

The result of the above discussion while considering the questions No.1 to 5, is that plaintiffs have failed to make out any case for interference. The two Courts below have rightly appreciated the evidence. There is no substance in the appeal which is dismissed and the impugned judgment, and decree are confirmed with no order as to costs.

(Kuldip Singh)
Judge

April 25 ,2007
(sks)